89-598

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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THOMAS J. PELSNIK,

Petitioner,

v.

CITY OF FAIRVIEW, OHIO,

Respondent.

---

PETITION FOR A WRIT OF CERIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE COURT OF APPEALS OF OHIO,
CUYAHOGA COUNTY

---

Appellant:
Thomas J. Pelsnik
P.O. Box 9923
Brookpark, OH 44142
(216) 885-4647

OCTOBER 1989

## QUESTIONS PRESENTED

## ASSIGNMENTS OF ERROR

### FIRST ASSIGNMENT OF ERROR

Can an investating officer order an accu who is the prime and only suspect, to in untarily supply evidence by using force coersion to submit to a field sobriety without the Miranda warning in violatic the Accused's rights secured by section Article I of the Ohio Constitution; and 5th Amendment to the US Constitut

### SECOUND ASSIGNMENT OF ERROR

Does an Accused have the guaranteed Con tutional Right of assistance of counsel his defense of his own choice whethe not the choice of counsel is liciense unliciensed, which is secured by Section Article I; 1st and 6th Amendments to th Constitution; and Article I, Sections 3. & 11, of the Ohio Constitution?

### THIRD ASSIGNMENT OF ERROR

Deleted.

FOURTH ASSIGNMNET OF ERROR

Does this appellant have a common law right to a common law jury of 12 when timely demanded in this particular case as secured by Article I, Section 5, of the Ohio Constitution; and the 6th Amendment to the US Constitution?

FIFTH ASSIGNMENT OF ERROR

Did the lower court error in failing to try this case within the time allowed by statute for a speedy trial pursuant to ORC 2945.71(B)(2) in violation of the due process clause and the right to a speedy trial secured by Article I, Section 10, of the Ohio Constitution, and the 6th Amendment to the US Constitution?

SIXTH ASSIGNMENT OF ERROR

Is ORC 2935.05 and/or 2935.08 and/or 2935.09 and/or 2935.10 and/or 2935.19 a manditory requirement for the lawful arrest and prosecution of this appellant in the State of Ohio pursuant to the due process guaranties secured by Sections 14 and 16, Article I of the Ohio Constitution; and the 4th and 5th

Amendments to the US Constitution.

SEVENTH ASSIGNMENT OF ERROR

Deleted.

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Fairview Park City Ordinance

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## JURISDICTIONAL STATEMENT

Thomas J. Pelsnik, the appellant in pro-ria persona, appeals from the final judgment of the Ohio Supreme Court, dated May 17, 1989, holding that there was no substantial constitutional question to be answered.

The Ohio Supreme Court was asked to review the 8th District Court Of Appeals ruling of which the 8th District Court ruled as follows:

First Assignment of Error: "...the administration of field sobriety tests by a police officer prior to arrest does not constitute custodial interogation for Miranda purposes".

Second Assignment of Error: "...that a criminal defendant has no right to representation by unlicensed counsel".

Third Assignment of Error: "Where the determination of an issue necessarily involves evidence not contained in the record, the appropriate remedy is through postconviction relief...".

Fourth Assignment of Error: "Crim. R. 23(B) provides for a jury of eight in misdemeanor cases".

Fifth Assignment of Error: "A motion for the disqualification of the trial judge constitutes a motion which will toll the statutory speedy trial period".

Sixth Assignment of Error: "...the failure to comply with R.C. 2935.05 does not invalidate a subsequent conviction on proper and suffi-

cient evidence".

Seventh Assignment of Error: Deleted

## OPINIONS BELOW

The opinion of the Supreme Court of Ohio, which appears in the appendix hereto, on page 44a, infra, is not reported.

## JURISDICTION

The appeal was dismissed by the Supreme Court of Ohio sua sponte for the claimed reason that no substantial constitutional question exists therein. The decision was entered on May 17, 1989.

A supplementary notice of appeal to this Court was timely filed in the Supreme Court of Ohio on July 13, 1987.

This appeal is being docketed in this Court within 90 days from the date of the dismissal. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(1) and/or (2).

## CONSTITUTIONAL PROVISIONS AND RULES

### FIRST ASSIGNMENT OF ERROR

Fifth Amendment, United States Constitution: No person....shall be compelled in any crim-

inal case to be a witness against himself.

SECOND ASSIGNMENT OF ERROR

Section 10 of Article I, U. S. Constitution:

No State shall.... pass any....Law impairing the Obligation of Contracts....

First Amendment, U. S. Constitution:

Congress shall make no law....abridging the freedom of speech,....or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sixth Amendment, U. S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right....to have the Assistance of Counsel for his defense.

THIRD ASSIGNMENT OF ERROR

Deleted.

FOURTH ASSIGNMENT OF ERROR

Sixth Amendment, U. S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

FIFTH ASSIGNMENT OF ERROR

Sixth Amendment, U. S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

SIXTH ASSIGNMENT OF ERROR

Fourth Amendment, U. S. Constitution:

....and No warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, U. S. Constitution:

....nor shall any person be deprived of life, liberty, or property, without due process of law.

ORC 2935.05:

When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall,....file or cause to be filed an affidavit describing the offense for which the person was arrested. Such affidavit shall be filed either with the court or magistrate, or with the prosecuting attorney.

ORC 2935.08:

Upon the filling of an affidavit or complaint as provided in sections 2935.05 or 2935.06 of the Revised Code such judge, clerk, or magistrate shall forthwith issue a warrant...

ORC 2935.09:

In all cases....in order to cause arrest or prosecution of a person charged with committing an offense in this state, a peace officer,....shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney....or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney.

## SEVENTH ASSIGNMENT OF ERROR

Deleted.

HOW THE FEDERAL QUESTION WAS RAISED

First Assignment of Error: The Miranda rule was claimed at the earliest possible stage of the criminal proceedings before the trial started. (See documents #18, 12, 17A, at page 1a-16a infra).

This Fifth Amendment claim was reiterated by appellant before the Eighth District Court of Appeals, then before the Supreme Court of Ohio on the grounds that an investigative officer is required to give the Miranda warning before he can extract information from an accused who is the prime and only suspect to an alleged crime.

All of the lower courts expressly rejected this federal constitutional claim.

Second Assignment of Error: The assistance of counsel issue was claimed at the earliest possible stage of the criminal proceedings before the trial started. (See Documents #6 & #20 at page 17a-24a infra)

This Sixth Amendment claim was reiterated by appellant before the Eighth District Court of Appeals and then before the Supreme Court

of Ohio on the grounds that an accused is entitled to choose and/or contract counsel of his own choice whether that counsel is unlicensed or licensed.

All of the lower courts expressly rejected this federal constitutional claim.

Third Assignment of Error: Deleted.

Fourth Assignment of Error: The Jury issue of 12 was claimed at the earliest possible stage of the criminal proceedings before the trial started. (See Document #10 at page 25a)

This Sixth Amendment claim was reiterated by appellant before the Eighth District Court Of Appeals, then before the Supreme Court of Ohio on the grounds that if an accused is entitled to a jury, then that jury is required to have 12 members in all criminal cases unless there is a waiver.

All of the lower courts expressly rejected this federal constitutional claim.

Fifth Assignment of Error: The speedy trial issue was claimed at the earliest possible stage of the criminal proceedings before the trial started. (See Documents #28 $ #31, at

page 32a-39a infra)

This Sixth Amendment claim was reiterated by appellant before the Eighth District Court Of Appeals, then before the Supreme Court of Ohio on the grounds that this accused has a right to have a competent Judge to rule on the case and should not have to give up the right to a speedy trial to assert the right to have a competent Judge.

All of the lower courts expressly rejected this federal constitutional claim.

Sixth Assignment of Error: The "Accusation By Affidavit To Cause Arrest or Prosecution issue was claimed at the earliest possible stage of the criminal proceedings before the trial started. (See Document #15 at page 40a)

This Fourth and Fifth Amendment claim was reiterated by appellant before the Eighth District Court Of Appeals, then before the Supreme Court of Ohio on the grounds that this accused has a right to due process of law by having an affidavit to prosecute filed properly pursuant to State & Federal Constitutions and the Ohio Revised Code require-

ments.

All of the lower courts expressly rejected this federal constitutional claim. Seventh Assignment of Error: Deleted.

STATEMENT OF THE CASE

On August 27,1987, the Accused was traveling easterly on Lorain Road, approaching a 4 lane bridge under construction on Lorain Road at approx. 1:30 am.

Lorain Road is a four lane highway. Lorain begins to narrow some 500' before the bridge. The Accused traveled accross the bridge and passed three parked cars that had no lights on in the east bound lane. The Accused crossed the center line to avoid hitting the parked cars. This manuver was accomplish with out any struggle or danger, and was executed properly according to statute.

As the Accused approached the traffic light for the parking lot for the hospital, the Accused notice red and blue flashing lights behind him. The Accused proceeded to pull into the parking lot of the hospital. The Accused stopped his car, exited it, and

proceeded to walk toward the rear of his car to meet the officer. The two individuals met at the halfway point approximately between both cars.

The Accused asked the officer "Did you see those three parked cars on the bridge without lights?" The officer did not answer, but said "May I see your driver license?" The Accused then handed the officer his drivers license.

The officer then ordered the Accused against his will, to walk a straight line. The Accused agreed under fear, and intimidation of the officer. The Accused performed the test easily, without any difficulty, or awkwardness.

The officer then ordered the Accused against his will, to touch his nose. The Accused agreed under fear, and intimidation of the officer. The Accused perform the test easily, without any difficulty.

The officer then ordered the Accused to recite the Alphabet. The Accused was not able to recite the alphabet. The Accused stated to

the officer that he had not recited the alphabet for 35 years. The Accused could not recite more than 50% of the alphabet.

NOTE: The Accused obeyed the arresting officers orders not voluntarily, but against his will under fear and intimidation. The officer kept his right hand close to his weapon at all times.

NOTE: The Accused was not told of his rights, especially his right to remain silent, since anything he said or did could be and would be used against him in a court of law.

The officer ordered the Accused to be a witness against himself contrary to the 5th Amendment of the US Constitution and Art I. Sec. 10 of the Ohio Constitution.

After the Accused had trouble resiting the alphabet, the officer informed the Accused that he was being arrested. The Accused tried to explain to the officer that he honestly could not recite the alphabet. The officer ignored the Accused. The Accused

was then placed under arrest.

At the scene of the arrest, the arresting officer read the Accused the Miranda Rights, while being hand cuffed. The Accused was placed in the back seat of the arresting officer's car.

The arresting officer then searched the inside of the vehicle belonging to the Accused. The arresting officer did not search the trunk of the car. The arresting officer did not find any confiscable items.

The arresting officer returned to the police car, and started driving to the police station. While enroute to the police station, the arresting officer then asked the Accused if he understood his Rights. The Accused honestly stated no. The arresting officer asked, "what don't you understand?" The Accused stated, "I do not know who my accuser is." The arresting officer stated, "I am your accuser."

The Accused then arrived at the police station. The Accused was then escorted to the interrogation room. The arresting officer

then asked the Accused if an attorney was desired.

The Accused answered, "I want Counsel, not an attorney". The Arresting Officer stated, "you can only have a licensed attorney". The Accused stated strongly, "I do not want a licensed attorney, I want my friend as counsel". The arresting officer asked, "Is your friend licensed?" The Accused answered "no". "I do not want a licensed attorney, only counsel." The arresting officer yelled, "Cut this shit out! Are you trying to be funny? Are you trying to be a smart ass?"

The Accused answered, "I am not trying to be smart, I just want my friend as counsel." "Why is the back of my hand numb from the thumb to the wrist?"

The arresting officer asked for the telephone number of the Accused's friend. Then the arresting officer then called the Accused's friend. The friend was told to come down to the station.

The arresting officer then asked the

Accused, "Will you take the breath analyzer test?" The Accused then asked, "What will happen if I don't?" The arresting officer then stated, "You will loose your licensed for a year." The Accused stated, "I will take it only under duress". The Accused was escorted to the breath analyzer machine. The Accused was given another field test for being intoxicated, without counsel being present. The Accused was able to perform all tests with ease, except for resiting the alphbet.

The Accused was asked preliminary questions pertaining to the breath analyzer machine, without counsel being present. The Accused then tested on the machine, again without counsel being present. The Accused was then escorted to a cell, to wait for his counsel to pick him up.

When counsel arrived at the station, the Accused then left with him.

Two citations were issued for allegedly violating sections 333.01A1 and 333.01A2 of Fairview Park City Ordinances. Sect. 333.01A1

concerns with under the influence of alcohol & Sect. 333.01A2 concerns with the concentration of ten-hundredths of one percent (0.10%) or more by weight of alcohol in ones blood. The Accused did not have a blood test at anytime to determind the alcohol weight content in the blood.

Arraignment was set for September 1, 1987, at which time the Accused appeared specially and not generally, challenging the jurisdiction over the person, subject matter, and court, and other proceedural and administrative matters. The prosecution did not prove jurisdiction. The Accused demanded Counsel of choice to assist and not to represent. The demand was over ruled by Judge Holmes. Judge Holmes entered a not guilty plea for the Accused over the objections of the Accused. Jury Trial was set for October 30, 1987.

On or about September 29, the Accused received a notice from the Rocky River Municipal Court for an oral hearing to suppress evidence scheduled for October 16,

1987.

On October 16 the Accused appeared in court to discuss the issue of ill gained evidence by the arresting officer. The Judge ruled against the Accused, and sent out notices to the prospective jurors for the scheduled trial date of October 30.

On October 27 the Accused filed Document #19 titled Notice & Demand To Disqualify Judge Holmes From The Above Case Number. An Affidavit in support was filed with it. On October 29, the Rocky River Municipal Court fowarded the notice of disqualification to Judge Leo M. Spellacy of the Common Pleas Court. Also sent was a letter from Judge Holmes and a signed journal entry with Judge Holmes voluntarily stepping down from this case. Judge Holmes emphasizes the fact that the arrest date of the Accused is August 27, and no time waiver was executed.

On or about November 11, the Accused received a notice from the Berea Municipal Court dated November 9, scheduling a pretrial

for November 16, and a jury trial for November 19 & 20 before Judge Todia. (November 25 was the deadline for 90 day speedy trial)

On November 16, the Accused appeared at the Berea Municipal Court in front of Judge Todia. The Accused filed 3 documents. 2 documents were concerning the illegal and unauthorized change of venue from the Rocky River Municipal Court to the Berea Municipal Court. Judge Todia did not discuss the paper work that was filed, even though oral argument was demanded.

Ralph DeFranco stated to Judge Todia that he could not make the trial date set for November 19 & 20 because of his heavy schedule. Hé stated that he might be able to make November 20 date for trial but would not know until the 19th. Judge Todia told the Accused to be ready for trial on the 19th and 20th. The Accused was ready as ordered. The Accused was present in the Building on the 18th and 19th. On the 19th the Accused was informed by one of the office clerks that trial would

be held in Rocky River Municipal Court with Judge Todia presiding. Trial was scheduled for December 3, 1987. (8 days past the 90 day time limit for speedy trial) The Accused informed the clerk that December 3 was 8 days past the time limit for speedy trial, and that the trial must be held by November 25.

On December 1, the Accused filed 2 documents in Berea Municipal Court. The title of document #28 was Notice & Demand For Immediate Dismissal For Failure To Prosecute Within 90 Days. Five exhibits and one affidavit accompanied the document in support of the demand.

On December 3, the Accused appeared for trial and filed a 2nd Notice And Demand For Immediate Dismissal For Failure To Prosecute/ 90 Days (Document #31). Judge Todia over ruled the demand for dismissal. The trial proceeded and the jury verdict was guilty. The Accused was fined $800.00 and costs, and 30 days in jail. All but 3 days were suspended if he attends 72 hour in-house drunk

driving school.

THE QUESTION IS SUBSTANTIAL

First Assignment of Error: This question as to the Fifth Amendment implications of the widespread practice of coercing an individual by force to take a field sobriety test to extract information to be used against the individual, and then informing him he now has a righ to remain silent is an absurbity to the State and Federal Constitutions. This issue has been answered many times before by this and other courts.

....where Accused was compelled by officers ....to submit to test involving walking, making sudden turns, placing finger on noise, answering questions, and chemical analysis of urine, testimony of officer as to such tests and conclusion that accused was intoxicated was inadmissible as violating constitutional provision against "self-incrimination". Apodaca v. State, 146 S.W.2d 381, at 381.

Demonstration by an act "which tends to self-incriminate is as obnoxiuos to the immunity guaranteed by the Constitution as one be words". Apodaca v. State, at 382.

The constitutional provision was not intended to merely protect a party from being compelled to make confessions of guilt, but protects him from being compelled to furnish a single link in a chain of evidence by which his conviction of a criminal offense might be secured. State v. Allison, 153 P.2d 141, 144; State ex rel. Attorney General v. Simmons

Hardware Co., 109 Mo. 118, 18 S.W. 1125; State v. Spier, 86 N.C. 600.

The rights guaranteed by the Constitution apply to all alike - the well-informed who know their rights as well as to the ignorant who never heard of such rights. There stands the right like the rock of Gibraltar and it so remains protecting the life and liberty of every person whether the particular person knows about it or not. State v. Allison, 153 P.2d 141, 144, 145, Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023.

The constituional prohibition against "self-incrimination" which prohibits compelling an accused to give evidence against himself is not limited strictly to the giving of such evidence upon the trial of the case but the prohibition applies whenever one is under arrest for a violation of the law or is being held by the authorities investigating a charge against him. Beachem v. State, 162 S.W.2d 706, 708.

The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will", during a period of custodial interrogation as well as in the courts or during the course of other official investigations. Miranda v. Arizonia (1966) 384 U.S. 436, 437.

In summary, the Accused was not free to leave the scene, and he was the only prime suspect of the allegations being rendered by the arresting officer. The officer used all the information that he coerced at the scene

as evidence to prosecute the Accused. Second Assignment of Error: This question as to the implications of Section 10, Article I, 1st and 6th Amendments, of the widespread practice of Municipal Courts refusing counsel of choice to accused individuals in violation of not only the common law, but also State and Federal Constitutions is totally and truly repugnant to the rights and freedoms people once were alowed to enjoy.

A. Section 10, Article I: Any individual in this country has unlimited right to contract. The federal constitution secures that right and no State shall pass any Law imparing the obligation of contracts.

The Accused is a functional illiterate. He has the right to contract with someone that he trusts and even possibly has a more understanding of what is happening during the proceedings.

By choosing a unlicense counsel, the accused would automatically be waiving any right to appeal for incompetent counsel. By choosing a license counsel or attorney, no

waiver would be present since all licensed counselors and attorneys are suppose to be competent.(?)

A conviction obtained where the accused was denied counsel of his choice is treated as void for all purposes. Burgett v. Texas, 389 US 109, 110, 114.

For a government official to mouth in a ritualistic way part of the warning about the right to counsel, while excluding the person relied upon as counsel is, in effect, to reverse the meaning of the words used. U.S. v. Tarlowski, 305 F Supp 112, 124.

A state or federal court which arbitrarily refuses to hear a party by counsel, denies the party a hearing, and therefore, denies him due process of law in a Constitutional sense. Reynolds v. Cochran, 365 U.S. 525, 530, 531.

The language of the Constitution cannot be interpreted safely except by reference to the Common Law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the convention who submitted it to the conventions of the thirteen states for ratification were born and brought up in the atmosphere of the Common Law and thought and spoke in its vocabulary... Exparte Grossman, 267 U.S. 87, 108.

1st Amendment: It was held that a state may not pass statutes prohibiting the unauthorized practice of law or the interference with the right to freedom of speech, secured in the First Amendment of the U.S. Consti-

tution. United Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 221, 222; NAACP v. Button, 371 U.S. 415, 429; and also in Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1, 6, 7.

6th Amendment: This Accused claims and demands the "Right" to "Assistance of Counsel" as imperative, necessary, essential, and prerequisite to a proper and successful defense of life, liberty, and property that has been endangered by the unlawful apprehension and restraint of said Accused. The "Right" to "Assistance of Counsel" may not be limited to any condition, because:

...it is one of the fundamental rights of life and liberty. Robinson v. Johnson, 50 F. Supp 774, 778.

The preparation of petitions must never be considered the exclusive prerogative of the lawyer. Laymen - in and out of prison - should be allowed to act as "next friend" to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar. Johnson v. Avery, (1969) 393 U.S. 483, 498.

The cooperation and help of laymen, as well as of lawyers, is necessary if the right of "resonable access to the courts" is to be available to the indigents among us. Johnson v. Avery, at 498.

We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.

Under the rule we announce today, every judge will know, when the trial of a misdemeanor starts, that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. Argersinger v. Hamlin, 407 U.S. 25, 37, 40.

Third Assignment of Error: Deleted.

Fourth Assignment of Error: This question as to the implications of the 6th Amendment, of the widespread practice of Municipal Courts reducing the number of jurors from 12 to 8 is totally repugnant to the Common Law and the U.S. Constitution. A accused is either entitled to a jury, or he is not. Where does the constitution authorize a partial jury in a criminal case. Who gave the States the power to reduce the Common Law Jury from 12 to 8? The Constitution says nothing about misdemeanor or felony cases. It just says "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

The reason that there is not a designated number of jurors in the 6th Amendment is

because the common law definition of the word jury meant 12 lawful individuals.

A "jury" implies 12 competent and disinterested men. Blair v. M. McCormack Const. Co., 107 N.Y.S. 750, 751.

In the absence of qualifications, the word "jury" means a Jury of 12. Neely v. Shepard, 92 Ill. App 422 at 422.

Trial by jury is by 12 free and lawful men, who are not of kin to either party, for the purpose of establishing the truth of the matter in issue. Smith v. Times Pub. Co., 36 A. 296, 297.

Any number less than 12 impartial men would not constitute a "jury" within constituional guaranty of speedy public trial by impartial jury. Anderson v. State, Tex.Cr. App., 117 S.W.2d 465, 467.

To constitute a jury, every lawyer knows that 12 lawful men are necessary, and that without this number no jury can exist. Where only 8 have been sworn, although they constitute so many peers, they are not a jury, and therefore are incompetent to pronounce a verdict. State v. Burket, S.C., 2 Mill; Const. 155, 156; 12 AM. Dec. 662.

In State v. Cox (1848) 8 Ark 436, where defendant...challenged the constitutionality of a statute limiting the number of jurors in peace justices courts to 6 men, the court held that where the constitution provided that the right of trial by jury shall remain inviolate, the defendant had the right to trial by a jury of 12, the statute was invalid. 47 ALR3d 895, 899 RIGHT TO TRIAL BY JURY - NUMBER OF JURORS.

The term "jury", as used originally in the constitution, implied twelve men who must unanimously concur in a verdict in order to



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render one. Accordingly, a statute which provided for a jury of six men in a probate court did not provide a jury within the meaning of the constitutional provision. Work v. State, 2 OS 297, 305.

In summary:

The court in Vaughn v. Scade (1860) 30 Mo 600, held that a statute providing for a six man jury in the law commissioner's court was in violation of the constitution, which declared the the right of trial by jury shall remain inviolate. .... If, in cases where the right to trial by jury is secured, the of jurors can be reduced from 12 to 6, it could, with equal propriety, be reduced to 4 or 2, the court reasoned. 47 ALR 895, 900.

If the Accused is found guilty, he pays for the jury and other court expenses. Therefore, there is no reason to reduce the number of jurors to less than 12 unless the state feels that it is easier to gain a conviction with less people on the jury.(?)

Fifth Assignment of Error: This question as to the implications of the 6th Amendment is basically centered around certain cryteria pertaining to what is an accused intitled to.

A. A competent judge to oversee the case.

B. A judge who can read the paper work that has been filed.

C. A judge who does not have to rely on a

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third person to read any paper work that is filed, who may miss quote, miss punctuate, miss pronounce words in the documents.

D. Competent public servants who claim to be officers of the Court.

F. To be brought to trial by the proper time the statutes allow.

The city of Rockyriver new that Judge Holmes was blind, and the Judge as well knew it. After several documents were filed, it became apparent to the Accused that the Judge was not digesting the material properly that was being read to him. It is common knowledge that the meaning of a sentence can be changed simply by removing or by the placement of punctuation. The accused was in fear of a fair hearing since Judge Holmes was not able to read the documents that were submitted for him to rule on. Why should an accused give up the right to a speedy trial, for the right to have a competent Judge rule on the case.This court stated "We find it intolerable that one constitutional right should have to be sur-

rendered in order to assert another". Simmons v. U.S., (1968) 390 U.S. 389, 394.

The main issue here is who was ready and present to go forward with the date set for trial that was within the 90 day time limit set for November 19, 1987, which was 6 days before the time limit was up. The Accused was present for trial on November 19, 1987, but was informed that the trial was post pone because the prosecuting attorney would not be available because he was scheduled for trial as a result of his private practice. The Accused should not have to suffer for the incompetance of the prosecuting attorney not being able to appear for trial. Judge Holmes made it very clear in his letter dated October 29, 1987 that the arrest date was August 27, and that no time waiver has been executed.

Sixth Assignment of Error: This question as to the implications of the 4th and 5th Amendments is basically centered around what cryteria is required for the lawful arrest and prosecution in the State of Ohio which is

as follows:

ORC 2935.05 Affidavit filed in case of arrest without warrant.

When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall file or cause to be filed an affidavit describing the offense for which the person was arrested.

ORC 2935.08 Issuance of warrant.

ORC 2935.09 Accusation by Affidavit to cause arrest or prosecution.

No Affidavit has been filed by the arresting officer to this date. Also, no warrant has been issued to this date. The requirements of ORC 2935.05, 2935.08, and 2935.09 have not been met.

Filing of affidavit is prerequisite to issuing of warrant and without filing of proper affidavit, no jurisdiction is aquired. State v. Titak, (1955) 144 N.E.2d 255, 257; State v. Lanser, 111 Ohio St. 23, 26; 144 N.E. 734, 735.

Seventh Assignment of Error: Deleted.

## CONCLUSION

It is quite apparent that there are numeros violations by the police and by the officers of the court. I an accused is required to obey the letter of the law, why shouldn't the public servants be required to

do the same. The law is for everyone, ask Richard M. Nixon and public servants that have been caught in violating the law.

For all these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Thomas J. Pelsnik
5503 Elizabeth Dr.
Parma, Ohio 44130

# APPENDIX

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The Rocky River Municipal Court

No. 87 TRC 8136 A
(Dec. 3, 1987)

Fairview Park
Plainfiff,

vs.

Thomas Pelsnik
Defendant.

JOURNAL ENTRY

Jury sworn. Trial had on sworn evidence, Jury verdict is GUILTY. Defendant found guilty $800.00 and costs, 30 days in jail suspend all but 3 days. Counter attack i.e. drunk driving school. Sixty (60) days license suspension - privilege to drive to and from work condition upon proof of insurance. One year inactive probation. Defendant to receive credit for 3 days in jail if he attends a 72 hour in-house drunk driving school. Imposition of sentence stayed pending outcome of appeal.

By: /S/ William C. Todia
Judge
William C. Todia

FILED: Dec 3, 1989

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 54915

| | | |
|---|---|---|
| CITY OF FAIRVIEW PARK | : | |
| | : | |
| Plaintiff-Appellee | : | JOURNAL ENTRY |
| | : | |
| -vs- | : | and |
| | : | |
| THOMAS J. PELSNIK | : | OPINION |
| | : | |
| Defendant-Appellant | : | |
| | : | |

DATE OF ANNOUNCEMENT OF DECISION: JANUARY 19, 1989

CHARACTER OF PROCEEDING: Criminal appeal from Rocky River Municipal Court Case No. 87-TRC-8136

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellee:

RALPH T. DeFRANCO, ESQ.
730 Leader Building
Cleveland, Ohio 44114

For Defendant-Appellant:

THOMAS J. PELSNIK, pro se
P.O. Box 9923
Brookpark, Ohio 44142

JOHN F. CORRIGAN, J.:

The defendant appeals from his jury trial conviction for driving while under the influence of alcohol. See Fairview Park Codified Ordinance Section 333.01(a)(1). the trial court granted the city's motion to dismiss a separate charge of driving with a blood alcohol content at or exceeding .10%. See Fairview Park Codified Ordinance Section 333.01(a)(2).

In his seven assignments of error the defendant raises nine issues for our consideration. He claims that the trial court erred in (1) denying his motion to suppress challenging the legality of the investigative stop of his vehicle, (2) denying his motion to suppress challenging the legallity of his arrest, (3) admitting the results of a breathalyzer test administered to him, (4) overruling his motion to have an unlicensed lay person represent him at trial, (5) conducting an ex parte hearing with the prosecutor, (6) denying his motion for dismissal for the violation of his statutory

## HOW THE FEDERAL QUESTION WAS RAISED

First Assignment of Error: The Miranda rule was claimed at the earliest possible stage of the criminal proceedings before the trial started. (See documents #18, 12, 17A, at page 1a-16a infra).

This Fifth Amendment claim was reiterated by appellant before the Eighth District Court of Appeals, then before the Supreme Court of Ohio on the grounds that an investigative officer is required to give the Miranda warning before he can extract information from an accused who is the prime and only suspect to an alleged crime.

All of the lower courts expressly rejected this federal constitutional claim.

Second Assignment of Error: The assistance of counsel issue was claimed at the earliest possible stage of the criminal proceedings before the trial started. (See Documents #6 & #20 at page 17a-24a infra)

This Sixth Amendment claim was reiterated by appellant before the Eighth District Court of Appeals and then before the Supreme Court

defendant. The city called both of these witnesses and their testimony remained substantially unchanged throughout both of the proceedings.

The arresting police officer testified that he first observed the defendant at approximately 1:15 a.m. driving a gray Toyota automoblie. The officer stated that he clocked the defendant traveling at a speed of 62 mph through a 35 mph zone in a residential area. The officer pursued the defendant through a two-lane, 15 mph construction zone where the defendant maintained his excessive speed. The officer testified that he saw the defendant cross the double yellow center line in order to pass four cars standing at a stop light at an intersection at the end of the construction zone. He claimed the defendant temporarily lost control of his vehicle, skidding sideways past the four cars and through the intersection. The defendant then regained control and parked his vehicle in a nearby hospital parking lot.

The Policeman testified that he

approached the defendant who remained in his car. He asked the defendant for his driver's license. The officer stated that he could smell a mild odor of alcohol emanating from the defendant. He then asked the defendant to step out of his vehicle and asked the defendant to perform four field sobriety tests. The defendant failed each of these tests. The officer then advised the defendant that he was under arrest for driving while under the influence. He read the defendant his Miranda rights, handcuffed the defendant, and transported him to the police station for further sobriety testing.

At the station the defendant once more failed four physical coordination tests. In response to questioning by the officer, the defendant admitted that he had been drinking "orange juice and Seagram's" since 10:00 p.m. that evening.

Another officer administerd a breathalyzer test to the defendant. He testified that the defendant was staggering when he first observed the defendant walking in the

station. The officer said that he could smell a moderate odor of alcohol on the defendant's breath. He further observed the defendant fail the physical coordination tests conducted at the station.

II.

The defendant in his first assignment of error raises three issues for our consideration. He first argues that the police made an illegal stop of his vehicle.

"The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." State v. Bobo (1988), 37 Ohio St. 3d, paragraph one of the syllabus. Terry v. Ohio (1968), 329 U.S. 1, 21. However, the police officer must be able to point to specific, articulable facts which would lead a reasonable person to suspect criminal activity is afoot. State v. Freeman (1980), 64 Ohio St. 2d 291, 294.

Here, the uncontradicted evidence shows that the arresting police officer observed the defendant speeding at over 60 mph in a 35

mph zone. The defendant then entered a 15 mph zone at the same rate of speed and temporarily lost control of his vehicle after recklessly crossing a double yellow center line and passing four cars standing at a stop light. Clearly, the police officer had reasonable cause to stop the defendant.

The defendant next complains that the police officer failed to read him his Miranda rights prior to performing three field sobriety tests. However, the administration of field sobriety tests by a police officer prior to arrest does not constitute custodial interrogation for Miranda purposes. Berkemer v. McCarty (1984), 468 U.S. 420, 442; Piqua v. Hinger (1968), 15 Ohio St. 2d 110, Paragraph two of the syllabus.

The defendant finally argues that the trial court erred in admitting the results of the breathalyzer test administered to him by the police. He argues that the one-year suspension for a driver's refusal to submit himself to the test, as provided under R.C. 4511.191(D), constitutes unlawful coercion.

However, the Supreme Court of Ohio has previously determined that license suspension is a permissible sanction for those who withdraw their consent to a sobriety test. See McNulty v. Curry (1975), 42 Ohio St. 2d 341, paragraph one of the syllabus; Hoban v. Rice (1971), 25 Ohio St 2d 111, paragraph one of the syllabus.

Moreover, the introduction of the results of the breathalyzer test resulted from the direct inquiry of the defendant during his cross-examination of the arresting officer. The defendant cannot now complain of the admission of that evidence where he successfully sought to introduce it at trial.

In addition, any error in the admission of this evidence would be harmless. See Crim. R. 52(A). The trial court granted the prosecution's motion to dismiss the charge of driving with a blood alcohol content of .10% or more. Further, the trial judge cured the admission of that evidence by specifically instruction the jury that it could not

consider the blood alcohol test in its deliberations.

All three of these contentions lack merit. Accordingly, we overrule his first assignment of error.

III.

The defendant in his second assignment of error claims that the trial court erred in denying his motion to permit his friend, an unlicensed lay person, to assist him at trial.

Repeatedly throughout the lower court's proceedings, the trial court advised the defendant of his right to an attorney. During the trial court's inquiry into his possible indigency, the defendant stated that he earned $14.00 per hour at a local automobile plant and he steadfastly maintained that he wanted his friend to act as his counsel at trial.

This court has recently held in two cases that a criminal defendant has no right to representation by unlicense counsel. Cleveland v. Cohen (Aug 13, 1987), Cuyahoga

App. No. 53135, unreported; Shaker Heights v. Carroll (Mar. 5, 1987), Cuyahoga App. No. 51832, unreported.

Accordingly, we overrule the defendant's second Assignment of error.

IV.

In his third assignment of error the defendant claims that the trial judge held an ex parte hearing with the prosecutor prior to trial. He apparently contends that the alleged communication violated his right to be present at all critical trial stages as guaranteed in the due process clause of the United States Constitution and Crim. R. 43(A).

The defendant filed an "objection" to this alleged hearing two days prior to trial. He attached an affidavit to his objection stating that he had observed the trial judge and the prosecutor in the judge's chambers discussing his case. The prosecutor in his brief denies such a hearing occured. Nothing in the record substantiates the defendant's assertions. Where the determination of an

issue necessarily involves evidence not contained in the record, the appropriate remedy is through postconviction relief pursuant to R.C. 2953.21, not by way of appeal. State v. Cooperrider (1983), 4 Ohio St. 3d 226, 228. Accordingly, we overrule the defendant's third assignment of error.

V.

The defendant in his fourth assignment of error challenges the trial court's denial of his motion for a jury trial consisting of twelve members.

Driving while under the influence is classified as a first degree misdemeanor pursuant to Fairview Park Codified Ordinance Section 303.99(a)(4)(A). Crim R. 23(B) provides for a jury of eight in misdemeanor cases. That rule satisfies state and federal constitutional standards. Cf. State, ex rel. Columbus v. Boyland (1979), 58 Ohio St. 2d 490, syllabus. Accordingly, the trial court properly overruled the defendant's motion for a jury of twelve.

We overrule the defendant's fourth assignment of error.

VI.

The defendant claims in his fifth assignment of error that the state violated his right to a speedy trial as guaranteed pursuant to R.C. 2945.71.

R.C. 2945.71(B)(2) provides that a person charged with a first degree misdemeanor must be brought to trial within ninety days of his arrest. In this case, the triple count provision of R.C. 2945.71(E) doesnot apply beause the police released the defendant following the completion of sobriety tests administered at the police station.

The record reveals that the trial court initially scheduled trial for the sixty-fourth day following the defendant's arrest. However, three days prior to that trial date, the defendant moved to disqualify the trial judge. That judge recused himself in response to the defendant's motion.

Ten days following the originally scheduled date for trial, the presiding judge of

the county court of common pleas assigned a new municipal court judge to the case. The new judge tentatively scheduled trial for the eighty-fourth day following the defendant's arrest. However, due to the constraints of his docket, the trial judge set trial for the ninety-eighth day.

Two days prior to this final trial date, the defendant filed a motion to dismiss for the prosecution's failure to comply with the ninety-day statutory period. The trial court overruled that motion, attributing the delay to the defendant's motion to disqualify the original trial judge three days prior to the initial date set for trial.

R.C. 2945.72 provides in relevant part:

> "The time within which a accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:
>
> "* * *
>
> "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

"* * *

A motion for the disqualification of the trial judge constitutes a motion which will toll the statutory speedy trial period. State v. Kothe (Dec. 26, 1985), Cuyahoga App. No. 49330, unreported. In this case the recusal of the original trial judge constituted, at the very minimum, a delay of ten days. This period is attributable to the defendant. The subtraction of those ten days from the ninety-eight-day period within which the prosecution actually brought the defendant to trial brings the defendant's trial date within the statutory time limitation.

The defendant, in oral argument, submitted in support of his claim this court's decision in City of Westlake v. Smith, the defendant filed no motion or affidavit for the trial judge's disqualification. The trial judge disqualified himself sua sponte. Here, R.C. 2945.72(E) operates to toll the speedy trial statute for a delay caused by the defendant's motion to disqua-

lify.

The defendant's contention lacks merit. Accordingly, we overruled his fifth assignment of error.

VII.

In his sixth assignment of error the defendant complains that the arresting police officer failed to file an affidavit describing the alleged offense as required under R.C. 2935.05. The record reveals that the police officer did file, with the municipal court, the original of the citation issued to the defendant. However, this does not statisfy the required form of an affidavit as required under R.C. 2935.19.

The police officer may well have neglected to follow the procedures required pursuant to R.C. 2935.05. However, the failure to comply with R.C. 2935.05 does not invalidate a subsequent conviction on proper and sufficient evidence. State v. Sampson (1982), 4 Ohio App. 3d 287, 288. Here, sufficient, competent evidence supports the defendant's conviction. Accordingly, we over-

rule his sixth assignment of error.

VIII.

The defendant in his seventh assignment of error asserts that the trial court abused its discretion in fining him $800 and sentencing him to thirty days' incarceration. The trial court suspended all but three days' of that sentence. Pursuant to the trial court's order, the defendant receives credit for those three days by attending a seventy-two-hour alcoholism education seminar.

Fairview Codified Ordinance Section 303.99 provides for a maximum fine of $1,000 and maximum term of imprisonment of six months for a first time drunk driving conviction. Thus, the trial court sentenced the defendant within the strictures of the applicable ordinance. A court of appeals cannot find that the trial court abused its discretion by imposing an excessive sentence where that sentence is within the statutory limits. State v. Coyle (1984),14 Ohio App. 3d 185, 186-187.

Accordingly, we overrule his seventh

assignment of error and affirm the trial court's judgement.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Rocky River Municipal Court to carry this judgement into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATTON, P.J. and

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DYKE, J., CONCUR.

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RECEIVED FOR FILING
JAN 19, 1989
Gerald E. Fuerst, Clerk

JOURNALIZED JAN 30 1989
GERALD E.FUERST,Clerk of Courts
By /s/ J Constence Deputy

/s/ John R. Corrigan

JUDGE
JOHN F. CORRIGAN

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

The Supreme Court of Ohio

1989 TERM

To wit: May 17, 1989

City of Fairview Park, :
Appellee, : Case No. 89-555

v. : E N T R Y

Thomas J. Pelsnik, :
Appellant. :

Upon consideration to the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Thomas J. Pelsnik.

(Court of Appeals No. 54915)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

In the Supreme Court of the
State of Ohio

| | | |
|---|---|---|
| Thomas J. Pelsnik, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | No. 89-555 |
| City of Fairview, Ohio | ) | |
| | ) | |
| Appellee, | ) | |

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Thomas J. Pelsnik, the appellant aboved-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Ohio, affirming the judgment of conviction, entered herein on May 17, 1989.

This appeal is taken pursuant to 28 U.S.C. 1257(1) [or(2)].

Appellant:
Thomas J. Pelsnik
P.O. Box 9923
Brookpark, Ohio 44142
(216) 885-4647

FILED: July 17, 1989

Proof of service

I, the undersigned, do hereby certify that I delivered a true and correct copy of this document on this 13 day, of July, to

Ralph De Franco by one of the following means:

A) hand delivered

B) certified mail

C) certified mail return receipt

D) regular mail

/S/ Thomas J. Pelsnik
Thomas J. Pelsnik